CITY OF BOSTON
FINANCE COMMISSION
152 NORTH STREET
ROOM 309
BOSTON, MA 02109
TEL. 367-6921
367-6981
FAX 367-6983

The Finance Commission has completed its investigation of the events and actions of city officials with respect to performing so-called "emergency" work required to open schools in September 1995. The Inspectional Services Department (ISD) refused to issue occupancy permits for 105 of the 117 public schools for the then upcoming school year. ISD identified hundreds of code violations which needed to be corrected in order for ISD to issue occupancy permits that would allow for a timely opening of school.

Schools opened on time. All schools received some long overdue work and the School Department spent $5.5 million to correct deficiencies last summer. It was an unbudgeted and unanticipated expense. Most of the work was performed by outside contractors and approximately 45% of it was performed on an overtime basis at a rate of $81 per hour. Change orders, amendments and a series of small contracts were approved in order to complete the work. One amendment which was illegally awarded to the principal outside contractor remains unpaid along with a second proposed amendment to that contractor. The cost billed to the City for those amendments was $1.8 million.

The contract amounts as well as the propriety of amending and changing contracts were known by School Department and city officials at the time.

Superintendent Thomas Payzant asked the Finance Commission in February, 1996 to help resolve the contractual problems resulting from that work. Superintendent Payzant further sought the Commission's assistance in reviewing certain policies and procedures of the School Department and city government with respect to other work completed at the time. The Commission was also asked by the administration of Mayor Thomas Menino to assist the City in obtaining a retroactive waiver of the public bidding laws in order to validate an illegally amended contract which would then enable the city to pay for services rendered.

The Finance Commission found this to be a financial and administrative nightmare for the School Department and City Hall. The nature of the so-called emergency was overstated. The City needlessly spent in excess of $500,000 on overtime to perform the work required by ISD. Moreover, the original labor rate, $54 per hour, was obtained in a contract bid under the provisisons of M.G.L. Chapter 149. The scope of the work performed was not in the terms of the original contract, therefore new contracts should have been bid in accordance with the public bidding laws of the Commonwealth.

During the course of its inquiry the Commission considered the following issues:

1. The $1,809,723 billed to the City by Siebe Environmental Controls ENE, Inc. (Siebe) for work performed during Aug/Sept 1995 for which there was no valid contract;

2. The payment of a $436,000 amendment to Lynnwell Electric, a company originally hired on the basis of a public bid to perform electrical equipment maintenance and emergency repairs in the Boston Public Schools;

3. $2.3 million paid by the School Deparment to vendors performing a variety of work under emergency work orders and invitational bids;

4. $200,000 in custodial overtime and $100,000 in overtime for employees of the office of Planning and Engineering;

5. The question of whether this matter actually was an emergency;

6. The failure of the School Department and city government to legally resolve outstanding billing issues.

The Siebe Contracts

The City of Boston has 117 schools. Over the years the issuance of occupancy permits had been delegated to the School Department by ISD. ISD personnel would periodically visit schools and conduct partial inspections, but ISD accepted the certification of the School Department that its buildings met the appropriate standards for the safety of its students.

In August, 1995 that process changed. ISD informed the School Department that it did not intend to issue occupancy permits to open schools until the School Department corrected hundreds of code violations. Due to the fact that school was scheduled to open in September, there was not enough time to seek public bids to perform the needed work.

When the School Department was informed that occupancy permits would not be issued to most city schools last summer by ISD, it faced the immediate problem of how to do the work. The correct decision would have been to seek an emergency waiver of the public bidding laws. Massachusetts General Laws, Ch. 149, 44A & J provide a legal avenue to waive a public bid in the event of an emergency. The law provides a procedure whereby the City seeks such a waiver from the State Division of Capital Planning and Operations (DCPO). It is likely that a waiver would have been granted for some of the work and a contractor(s) could have been hired to perform the work needed to safely open the schools. But that did not happen. The pressure of responding immediately created a degree of panic and all rules were ignored.

A decision was made internally by the Director of Facilities Management and supported administratively to amend an existing contract to perform the work. Siebe was chosen to be the vendor because it held existing contracts with large unexpended balances. It held two contracts with the School Department awarded to it through a public bid process. Both contracts were awarded for fiscal year 1995 and each had two year options for fiscal years 1996 and 1997. The first contract in an amount of $672,018 was to perform maintenance work for automatic temperature controls and energy management systems in various schools. The second contract was in an amount of $1,372,522.80 for the preventative maintenance of mechanical equipment and installation in various schools.

The work to be performed was not related to the nature of either contract yet the City directed the vendor to proceed and it agreed to do so. Essentially, Siebe acted as a broker for the required services. It subcontracted with M.L. McDonald to hire the needed labor to perform the work and it purchased

the materials. Because the amount of the contract was insufficient to cover the expense the School Department processed an amendment to one of the two Siebe contracts. The amendment of $672,018 was the amount of the third option year. It was processed by the Director of Facilities Management, approved by the General Counsel to the School Deparment, signed by the then Acting Superintendent and forwarded to City Hall. There it was reviewed internally by a Law Deparment staff attorney, signed by Corporation Counsel and executed by the Mayor on October 16, 1995.

The contractual process requires sign-off by department heads as a safeguard. There is one additional safeguard with unadvertised contracts and that is the review of the Finance Commission. The Siebe contract amendment was not sent to the Finance Commission for review.

Some of those officials responsible for reviewing the contract suggested to the Commission that it was difficult to ascertain that the amendment was unrelated to the original contract. However, such a position is unacceptable. In this instance the letter of amendment clearly identified that its purpose was to provide for emergency work required by ISD in order to obtain occupancy permits. It was not related to the purpose of the existing contract.

The initial amendment was rapidly expended and a second amendment with Siebe, to its mechanical equipment maintenance contract, was processed. It too was drafted by the Director of Facilities Management and approved by the General Counsel to the School Department. It was initially sent to the Law Department for review in September, 1995 and resubmitted with recommended changes in October, 1995 but no action was taken. The proposed amendment remained under review for two months.

At that point, which was December, 1995, the City's Corporation Counsel was informed by her staff about the problem. However, they failed to inform her that the previous amendment had received their approval. Corporation Counsel informed the City Auditor who stopped subsequent payment and sought ways to rectify the problem. Another two plus months went by until February, 1996 when the City sought a retroactive bid waiver from DCPO to validate a contract and make payment.

Siebe continued to perform and submit bills for preventive maintenance work. The Auditor made no more payments and began a process of backing out expenses equal to the amount of work billed for the emergency.

Superintendent Payzant established a committee to review all bills submitted by Siebe and make a determination on an amount owed by the School Department. The committee included the Business Manager of the School Department, General Counsel of the School Department, City Auditor, the Executive Director of the Finance Commission and the project manager from Planning and Engineering (P & E). A review of all billings resulted in an adjustment of $121,716

Emergency Waiver Request

The waiver was a problem. The history of this matter was such that the City could not defend its claim that it sought an emergency waiver at the earliest possible time. The fact is that numerous School Department and city officials were directly involved in and were aware of the work and how it was being performed.

Corporation Counsel argued that she took action upon learning of the problem in December, which was true, but it was not until February that a waiver was sought. DCPO was in an awkward position in that a waiver would resolve the issue of paying a deserving vendor and perhaps preventing that vendor from falling into bankruptcy. DCPO asked the Finance Commission to consult with the Office of the Inspector General (IG) on the events that transpired. The Commission did so and supported the waiver request. At that point a waiver was the best solution. The IG did not support the waiver. The City was informed, verbally on March 29, 1996 and in writing on April 11, 1996 that the waiver was being denied.

Curiously, in its letter of denial, DCPO commended the leadership of the Boston Public Schools and the Corporation Counsel for the manner in which the problem was addressed. The officials who were involved included:

Rob Roy, Director of the Office of Planning and Engineering. Mr. Roy should have sought an emergency bid waiver. He should not have opted to amend the Siebe contract.

Linda Walsh, General Counsel to the School Department. Ms. Walsh approved the award of the contract and should have known it was an illegal amendment.

Acting Superintendent Arthur Steller. Dr. Steller was directly involved in making sure the work was done. He was aware of the significant added cost, knew that the work was being done by Siebe and signed the contract.

Law Department staff. They performed the internal city review of the contract and should have known it was an illegal amendment.

Corporation Counsel Merita Hopkins. Her signature appears on the amended contract but her approval is granted based on a staff review. She relied on that review. Upon learning of the seriousness of the problem she directed that it be fully reviewed and the costs verified.

Mayor Thomas M. Menino. Mayor Menino executed the contract via his signature. He relies on others to insure that every contract presented to him is legal. The Mayor's senior staff was aware of the cost and knew and approved of the contract amendments.

City Auditor Sally Glora. Ms. Glora relies on proper department procedures. When she learned of the mistake she moved quickly to correct it.

Although the Siebe contract received the bulk of the attention of School Department and city officials, the School Department also paid $436,000 to Lynnwell Assoc., Inc. under its contract to provide electrical equipment maintenance. The contract was used to employ a vendor to expedite emergency work, in this case, exit signage and emergency lighting.

The purpose of the originally bid contract was for the maintenance of electrical equipment. Although the required emergency services could be considered related to the original purpose of the contract, the occupancy issue should have resulted in a separately executed contract. The fact that the amendment exceeded annual bid price by 40% is ample evidence of that fact. The Lynnwell contract was orignally awarded under the privisions of M.G.L. Ch. 149 which has no statutory limit in terms of amendments. However, Attorney General opinions and common sense dictate that a new contract should have been sought.

The School Department further expended $2.3 million to companies using multi-vendor contracts. Prior to the beginning of the fiscal year, the School Department advertises for companies interested in periodically performing various types of emergency work in the schools. Responding companies prequalify on a bidder's list and enter into a contract with the School Department. The subsequent implementation requires that in no event shall any single contract with a company exceed $10,000, although the aggregate amounts of all such contracts may exceed $10,000. The prequalification process resulted in 328 companies responding, each of which entered into a contract with the School Department for amounts not to exceed $250,000 for the year.

The implementation of the multi-vendor contracts requires that written quotes are sought from at least three vendors for each job for work under $10,000. The School Department sought bids and retained records supporting that fact. Work is not meant to be split up in order to avoid bidding. But there were a number of jobs performed by the same companies of a related nature that exceeded $10,000.

Overtime

The School Department spent $300,000 in direct overtime costs to custodians and employees of the Department of Planning and Engineering. Custodians are required to be present under the terms of their contract when a building is open. Because much of the work was performed when a school would normally be closed a custodian had to be present. That cost was $200,000.

Work also had to be supervised and that was the responsibility of the Department of Planning and Engineering. Staff employees were in all the schools verifying that work was done. The overtime cost was $100,000.

Was this an Emergency?????

Over the years ISD has not made it a practice to inspect all 117 schools annually for the purpose of granting occupancy permits. That changed for the 1995-96 school year. Every school was visited and only 12 of the 117 schools passed an initial occupancy inspection. ISD then informed the School Department that it would not issue permits until all work was completed.

ISD failed to conduct inspections in advance to allow for a timely and less costly series of repairs. Furthermore, ISD had not raised any issues regarding occupancy permits or safety at any point in the 1994-95 school year.

This was the dilemma facing the School Department in mid-August, 1995. The Director of the Department of Planning and Engineering was of the opinion that DCPO would not issue an emergency bidding waiver for all the work. The answer to that will never be known. The Commission reviewed the history of P & E with respect to waiver requests and our findings were mixed. P & E does not seek waivers on a regular basis. The last waiver sought by P & E was for an oil spill at the Tobin School in 1994. A full waiver was granted at that time. The Commission did not review all contract work performed by P & E over the past two years but it seems likely that at some point some emergency work in excess of $10,000 was needed.

Perhaps pertinent to this case was a fire at the Trotter School. A fire had significantly damaged a classroom at the school and P & E sought a waiver to make the building safe and complete repairs. DCPO determined that boarding up the classroom was an emergency but the actual repairs did not constitute an emergency and had to be publicly bid.

The Director of P & E believed that DCPO would not grant an emergency waiver for all the work being done. It was in part his past experience knowing that the hundreds of violations cited by ISD could not all be called emergencies. Some issues, such as the installation of emergency lighting and panic hardware may have led to the granting of a waiver. But many other cited violations were not emergency issues: carpentry work, flooring, telephone problems, windows, furniture acquistion, ironwork, sound equipment, oil burner repairs, a variety of plumbing work, installing data cables, chain link fence, installing stage curtains, soffit enclosure work, freezer work and on and on.

Findings and Conclusions

The entire series of events was a manufactured emergency readily avoidable with basic planning and cooperation between city agencies. ISD had neglected its duties with respect to occupancy permits for years and in an effort to make up for lost time ran roughshod over the process. If the occupancy issues were so serious to deny permits in August, 1995 then why were those same schools safe just 8 weeks earlier?

The Mayor's office should have directed ISD and the School Department to work cooperatively to complete the emergency work in a timely, costly and legal manner. A waiver should have been sought for legitimate emergency items, bids sought and the work performed but not on an overtime basis. Other work cited should have been done through a normal public bidding process and within the framework of the School Department budget.

The same amount of work could have been done at a much lower cost. The direct savings to the School Department would have been:

1. $300,000 in School Department employees overtime;
2. $287,000 in overtime labor rates to outside contracts;
3. $121,000 in profit and mark-up charges paid billed by outside vendors.

Other likely savings would have been:

1. $300,000 in lighting supplies;
2. a reduced hourly labor rate of $4-6 hourly were the contract bid as opposed to the "negotiated" rate of $54/hour saving $74,000 and $60,500 in overtime.
3. The cost of staff time being used to resolve the contract problems of probably $25,000 to $30,000.

ISD performed a costly disservice to the City due to its haphazard method of reinspection. Many of the violations corrected by the School Department were not cited in initial inspections. Many were not cited until a third or fourth visit. ISD had a practice of sending a different inspector to perform follow-up visits. The second inspector would review the work completed but oftentimes cited additional violations. That process occurred in 52 schools.

Furthermore, it seems that temporary permits would have insured that work would be done. Actually, fifteen schools were opened and remained open with temporary permits.

The appropriate first step should have been to seek a waiver of the bidding laws. DCPO now maintains that it would have approved of the bid waiver if submitted in a timely manner. While that may be true, we must point out out that it did take DCPO two months to respond to the February 9, 1996 request. Mr. Roy can be faulted for not pursuing a bid waiver. He can also be faulted for initiating the amendment. But the truth is that Mr. Roy was under tremendous pressure to get a lot of work done in a limited time frame. Then Acting Superintendent Steller and the Mayor's staff kept pressing for the work to be performed. Those people were aware that the costs were high, that outside vendors had been brought in to do the work and that significant amendments were needed to pay for the services.

Moreover, the School Department support staff and the Law Department staff should have stopped the process but did not. The Law Department also authorized the signing of the first amendment and the Mayor's Office staff recommended that the Mayor sign the contract.

Part of the task of the Commission was to determine what went wrong and which city officials could have done things differently. With the exception of the City Auditor, every city and school department official could have acted in a more appropriate manner. If students were in jeopardy then an emergency should have been declared, certainly for bidding purposes. If not, and that was more likely the case, then a plan should have been put in place for an expeditious but legal process.

The City has done a disservice to Siebe by not reaching a solution to the payment problem. It took until February 9, 1996 to seek a waiver. DCPO was slow to respond and even at this point there is no resolution. The City had two choices after not receiving authorization to execute an emergency contract. One was to seek special legislation to validate a

contract, a process which would be supported by DCPO, the IG and the Finance Commission. The second was await legal action by Siebe. The City opted to await legal action. Siebe filed suit against the City on May 31, 1996.

It seems evident that internal steps need to be taken to review the bid procedures and contract policies of the City of Boston. City employees with contracting responsilities should know the law. Steps should also be taken to conduct in-service training with respect to managing multi-vendor contracts to insure that the law is followed and the proper paperwork exists to document every contract.

The approval of an illegal amendment is particularly disturbing. The Corporation Counsel needs to address a lot of issues regarding municipal contracts. A timely and proper review is a crucial component.